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CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1867

UNITED STATES OF AMERICA, *Petitioner*

v.

NELSON E. "BUCK" SANFORD, ET AL, Respondents

BRIEF OF RESPONDENTS REQUESTING DENIAL OF THE PETITION FOR WRIT OF CERTIORARI

The United States has petitioned for a writ of certiorari to review the judgement of the United States Court of Appeals for the Ninth Circuit in this case. Respondents request that certiorari be denied.

JURISDICTION

The petition invokes jurisdiction under *28 U.S.C. 1254 (1)*. Respondents contend that the petition does not state special and important reasons therefor as called for in the Supreme Court Rules, Part V, Jurisdiction On Writ of Certiorari, Rule 19, considerations governing review on certiorari. The petition does not specifically prove that this "court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter", or that the circuit court "has decided an important question in a way in conflict with applicable decisions of this court" as required by *Rule 19, 1 (b)*.

QUESTION PRESENTED

Respondents are dissatisfied with the Question Presented as stated in the petition and prefer the language used in the Circuit Court decision and as follows:

> Is the government precluded from appealing because double jeopardy prohibits further prosecution where a mistrial, caused by a hung jury, was followed by judicial action terminating the trial in respondents' favor based on evidence heard during the trial?

STATEMENT OF THE CASE

Respondents do not disagree with the petitioner's Statement set forth there on pages 2 through 9, except to point out that on remand and during oral argument before the Court of Appeals, respondents did contend that the appeal should be dismissed because of the double jeopardy prohibition.

WHY CERTIORARI SHOULD BE DENIED

Respondents contend that certiorari should be denied because (1) *Serfass, Wilson* and *Jenkins*[1] have established the law that applies to this case and a further review thereon by the Supreme Court is necessary, (2) the circuit court's decision was correct in view of *Serfass, Wilson* and *Jenkins* and was not in conflict therewith, and (3) there are no conflicting decisions from another court of appeals on this same matter.

SERFASS, WILSON AND JENKINS

Serfass supports this circuit court decision. There, an indictment was dismissed prior to trial and before a jury was em-

[1] *Serfass v. United States*, 420 U.S. 377, *United States v. Jenkins*, 420 U.W 358, and *United States v. Wilson*, 420 U.S. 332.

panelled and sworn. Jeopardy never attached and so the government properly had the right to appeal.

In this *Sanford* case, a jury was empanelled and sworn, at which time jeopardy attached. Following a hung jury and a declaration of a mistrial, the district court then granted a motion to dismiss based on evidence heard during the trial, which terminated this case in respondents' favor.

The government argues correctly that a retrial after a mistrial caused by a hung jury is not barred by double jeopardy, but this is not our case, and this is not *Serfass*. *Serfass* held at *43 L.Ed.2d at page 274:*

> "As an aid to the decision of cases in which the prohibition of the Double Jeopardy Clause has been invoked, the courts have found it useful to define a point in criminal proceedings at which the constitutional purposes and policies are implicated by resort to the concept of 'attachment of jeopardy'. See United States v. Jorn, 400 U.S. at 480. In the case of a jury trial, jeopardy attaches when a jury is empanelled and sworn. Downum v. United States, 372 U.S. 734 (1963); Illinois v. Somerville, 410 U.S. 458 (1973). In a non-jury trial, jeopardy attaches when the court begins to hear evidence. McCarthy v. Zerbst, 85 F.2d 640, 642 (1949). The Court has consistently adhered to the view that jeopardy does not attach, and the constitutional prohibition can have no application, until a defendant is 'put to trial before the trier of facts, whether the trier be a jury or a judge.' United States v. Jorn, 400 U.S., at 479. See Kenner v. United States, 195 U.S. 100, 128, 130-131 (1904); United States v. McDonald, 207 U.S. 120, 127 (1907); Bassing v. Cady, 208 U.S. 386, 391-392 (1908); Collins v. Loisel, 262 U.S. 426, 429 (1923).

> "Under our cases jeopardy had not yet attached when the District Court granted petitioner's motion to dismiss the indictment. Petitioner was not then, nor has he ever been, 'put to trial before the trier of facts."

The respondent Sanfords have been "put to trial before the trier of facts."

The government wants to have the best of two worlds by claiming that the mistrial wiped the slate clean and somehow operated to remove jeopardy which had there clearly attached under *Serfass*. A retrial after a mistrial caused by a hung jury is permitted by law as one of the established exceptions to the double jeopardy bar to further prosecution. This principle has been followed ever since it was first established in *United States v. Perez*, 9 Wheat. 479. As this rule applies to this case, if the trial court had not terminated it in respondents' favor, then there could have been no possible objection to a retrial. In that situation the only previous decision would have been the mistrial, caused by the hung jury, clearly not a decision either in favor of the government or in favor of the respondents. There, even though jeopardy had attached during the first trial, a retrial would be permitted.

However, here the trial court terminated this case in respondents' favor, based on evidence heard during the jury trial and after jeopardy had attached. Just as double jeopardy bars a government appeal from a jury verdict of not guilty, so does double jeopardy bar this appeal.

In *Serfass* there was no termination in favor of the defendant after jeopardy had attached, and here there was a termination in favor of respondents after jeopardy had attached.

Wilson establishes the law that double jeopardy will not bar a government appeal where no ruling thereon could subject the defendant to a second trial. There, by postverdict motion after a guilty verdict, the indictment was dismissed. So on appeal *Wilson* could prevail, the matter would be final and there would be no second trial, or the government could prevail, and there still would be no second trial, as the case would then revert to the guilty verdict. *Wilson* said that "Since reversal on appeal would merely reinstate the jury's verdict, review of such an order does not offend the policy against multiple prosecution".

Contrast *Wilson* with respondents' position where a reversal on appeal would subject them to a second trial.

In *Jenkins*, the Court held that ". . . it is of critical importance whether the proceedings in the trial court terminate in a mistrial . . . or in the defendant's favor . . . " 420 U.S. at 365 n. 7 and as cited in the Circuit Court decision in this case. In *Jenkins*, the District Court dismissed the indictment and discharged him following a bench trial. Jeopardy had attached. A successful appeal by the government would require a second trial. In holding that double jeopardy barred the government's appeal, this Court held at *43 L.Ed.2d at page 250:*

> "Here there was a judgment discharging the defendant, although we cannot say with assurance whether it was, or was not, a resolution of the factual issues against the Government. But it is enough for purposes of the Double Jeopardy Clause, and therefore the determination of appealability under 18 USC 3731 (18 USCS 3731), that further proceedings of some sort, devoted to the resolution of factual issues going to the

> elements of the offense charged, would have been required upon reversal and remand."

Respondents respectfully contend that *Serfass* establishes that the government can appeal until the time that jeopardy attaches, and *Wilson* and *Jenkins* establish that even after jeopardy attaches, the government can appeal if a reversal on appeal will not subject the defendant to a second trial, and that there is a critical difference between a mistrial caused by a hung jury and a termination of a case in favor of the defendant after jeopardy has attached. The Circuit Court correctly applied this law to respondents' case. There is no need for further consideration by the Supreme Court. The government should now be able to understand these limits on its expanded rights to appeal.

CONFLICTING CIRCUIT COURT DECISIONS

In paragraph 2, at page 14, of the petition, the government cites *United States v. Wilson,* No. 75-1944, decided April 22, 1976 as a conflicting decision from the Sixth Circuit and respondents respectfully differ. There, the question of jurisdiction to entertain the appeal was not discussed. The question there was whether double jeopardy barred a second trial and the Sixth Circuit correctly held that the district court's decision thereon was erroneous. This same law would apply to respondents' case.

The real problem appears to be in trying to set out what the problem is. The government petition starts out by incorrectly stating the question involved and then by arguing that the circuit court decision bars the government from appealing any

pretrial orders of a second trial which follows a mistrial caused by a hung jury. These are not the facts or the law.

In this case, the Circuit Court has held only that following a mistrial caused by a hung jury and where the District Court has then granted respondents' motion to dismiss the indictment, based on evidence heard during their first trial, which terminated the case in their favor, that (1) jeopardy attached, (2) there was a termination in respondents' favor, (3) a reversal on appeal would subject respondents to a second trial, and (4) this constitutes double jeopardy which bars the government's right to appeal.

As noted in *Jenkins* at *43 L.Ed.2d at page 250:*

> "The trial, which could have resulted in a judgment of conviction, has long since terminated in respondent's favor. To subject him to any further such proceedings at this stage would violate the Double Jeopardy Clause:
>
> > "The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity . . .' Green, supra, at 187, 2 L Ed 2d 199."

CONCLUSION

Certiorari should be denied.

Respectfully submitted,

CHARLES F. MOSES
Attorney for Respondents.

July 1976

CERTIFICATE OF SERVICE

I certify that I served this Brief of Respondents Requesting Denial of the Petition for Writ of Certiorari on:

SOLICITOR GENERAL
Department of Justice
Washington, D.C. 20530

UNITED STATES ATTORNEY
Federal Building
Billings, Montana 59101

by depositing two copies each respectively to them in the United States Post Office, Billings, Montana, on July 23rd 1976, first class postage prepaid, at such addresses.

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Charles F. Moses

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